

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6	RANDALL GONZALEZ,)	
7)	No. CV-10-260-JPH
	Plaintiff,)	
8	v.)	ORDER GRANTING DEFENDANT'S
)	MOTION FOR SUMMARY JUDGMENT
9	MICHAEL J. ASTRUE, Commissioner)	
10	of Social Security,)	
)	
11	Defendant.)	
12)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on August 5, 2011 (ECF No. 13, 17). Attorney Jeffrey Schwab represents plaintiff; Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge (ECF No. 6). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's motion for summary judgment (**ECF No. 17**) and **denies** plaintiff's motion for summary judgment (ECF No. 13).

JURISDICTION

Plaintiff protectively applied for disability insurance (DIB) and social security income (SSI) benefits on April 9, 2008 alleging disability beginning January 1, 2002, due to a shattered left heel and ankle (SSI at Tr. 126-128, DIB at Tr. 129-130, 141).

1 The applications were denied initially and on reconsideration (Tr.
2 83-86, 87-90).

3 At a hearing before Administrative Law Judge (ALJ) Jean R.
4 Kerins on October 21, 2009, plaintiff, represented by counsel, and
5 a vocational expert testified (Tr. 37-71). On January 29, 2010,
6 the ALJ issued an unfavorable decision (Tr. 19-28). The Appeals
7 Council accepted additional evidence and denied plaintiff's
8 request for review on June 24, 2010 (Tr. 1-4), making the ALJ's
9 decision the final decision of the Commissioner. Pursuant to 42
10 U.S.C. § 405(g), this final decision is appealable to the district
11 court. Plaintiff sought judicial review on August 18, 2010 (ECF
12 No. 1,4).

13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing
15 transcript, the ALJ's decision, the briefs of the parties, and are
16 briefly summarized here where relevant.

17 Plaintiff was 30 years old at onset. He has an eleventh or
18 twelfth grade education and did not earn a diploma or GED. He has
19 worked in construction and as a roofer. In 1999 he injured his
20 left foot after he fell from a roof (Tr. 41, 358, 369). He has had
21 several foot surgeries, most recently in 2003 and again in June
22 2009 (Tr. 42-43, 420). Plaintiff testified he completed some of
23 the requirements to work as a barber, but found prolonged standing
24 too painful (Tr. 47). Written reports indicate he stopped working
25 in January 2002 (Tr. 142), completed barber school in 2004 (Tr.
26 147), and is in constant pain (Tr. 157, 165).

27 Mr. Gonzalez testified he last worked in 2001, 2003, or 2004
28 as a roofer (Tr. 41-42). He was in jail off and on beginning in

1 2007, and was released in May or June 2008 after serving a 90 day
2 sentence (Tr. 39-40). Plaintiff could not recall any restrictions
3 on his activities while incarcerated (Tr. 42). Prolonged standing
4 and walking cause hip pain. Pain interferes with sleep. Sometimes
5 he uses crutches. His foot swells (Tr. 42, 44, 46, 59-60). He has
6 left shoulder pain but has not sought treatment (Tr. 42-43).
7 Plaintiff can walk 10-15 minutes, stand 5-10 minutes, and lift 40-
8 50 pounds (Tr. 45, 47-48, 53-54). Randel Bunch, M.D., sees
9 plaintiff every three months and prescribes pain medication (Tr.
10 48). Mr. Gonzalez makes lamps and necklaces, stays home with
11 children, drives a car with a standard transmission, visits
12 family, and watches television (Tr. 49, 52, 55, 58). He also does
13 laundry, cooks, shops, and attends church two hours a week. With
14 some help, he cares for pets, feeds the children, and gets them
15 ready for bed (Tr. 169-171, 173).

16 SEQUENTIAL EVALUATION PROCESS

17 The Social Security Act (the Act) defines disability as the
18 "inability to engage in any substantial gainful activity by reason
19 of any medically determinable physical or mental impairment which
20 can be expected to result in death or which has lasted or can be
21 expected to last for a continuous period of not less than twelve
22 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
23 provides that a Plaintiff shall be determined to be under a
24 disability only if any impairments are of such severity that a
25 plaintiff is not only unable to do previous work but cannot,
26 considering plaintiff's age, education and work experiences,
27 engage in any other substantial gainful work which exists in the
28 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 Thus, the definition of disability consists of both medical and
2 vocational components. *Edlund v. Massanari*, 253 F.3d 52, 1156 (9th
3 Cir. 2001).

4 The Commissioner has established a five-step sequential
5 evaluation process for determining whether a person is disabled.
6 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
7 is engaged in substantial gainful activities. If so, benefits are
8 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
9 the decision maker proceeds to step two, which determines whether
10 plaintiff has a medically severe impairment or combination of
11 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

12 If plaintiff does not have a severe impairment or combination
13 of impairments, the disability claim is denied. If the impairment
14 is severe, the evaluation proceeds to the third step, which
15 compares plaintiff's impairment with a number of listed
16 impairments acknowledged by the Commissioner to be so severe as to
17 preclude substantial gainful activity. 20 C.F.R. §§
18 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
19 App. 1. If the impairment meets or equals one of the listed
20 impairments, plaintiff is conclusively presumed to be disabled.
21 If the impairment is not one conclusively presumed to be
22 disabling, the evaluation proceeds to the fourth step, which
23 determines whether the impairment prevents plaintiff from
24 performing work which was performed in the past. If a plaintiff is
25 able to perform previous work, that Plaintiff is deemed not
26 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
27 this step, plaintiff's residual functional capacity (RFC)
28 assessment is considered. If plaintiff cannot perform this work,

1 the fifth and final step in the process determines whether
2 plaintiff is able to perform other work in the national economy in
3 view of plaintiff's residual functional capacity, age, education
4 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
5 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

6 The initial burden of proof rests upon plaintiff to establish
7 a *prima facie* case of entitlement to disability benefits.

8 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

9 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is

10 met once plaintiff establishes that a physical or mental

11 impairment prevents the performance of previous work. *Hoffman v.*

12 *Heckler*, 785 F.3d 1423, 1425 (9th Cir. 1986). The burden then

13 shifts, at step five, to the Commissioner to show that (1)

14 plaintiff can perform other substantial gainful activity and (2) a

15 "significant number of jobs exist in the national economy" which

16 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th

17 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

18 STANDARD OF REVIEW

19 Congress has provided a limited scope of judicial review of a

20 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

21 the Commissioner's decision, made through an ALJ, when the

22 determination is not based on legal error and is supported by

23 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th

24 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The

25 [Commissioner's] determination that a plaintiff is not disabled

26 will be upheld if the findings of fact are supported by

27 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th

28 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is

1 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
2 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
3 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
4 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
5 573, 576 (9th Cir. 1988). Substantial evidence "means such
6 evidence as a reasonable mind might accept as adequate to support
7 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
8 (citations omitted). "[S]uch inferences and conclusions as the
9 [Commissioner] may reasonably draw from the evidence" will also be
10 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
11 review, the Court considers the record as a whole, not just the
12 evidence supporting the decision of the Commissioner. *Weetman v.*
13 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
14 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

15 It is the role of the trier of fact, not this Court, to
16 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
17 evidence supports more than one rational interpretation, the Court
18 may not substitute its judgment for that of the Commissioner.
19 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
20 (9th Cir. 1984). Nevertheless, a decision supported by substantial
21 evidence will still be set aside if the proper legal standards
22 were not applied in weighing the evidence and making the decision.
23 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
24 433 (9th Cir. 1987). Thus, if there is substantial evidence to
25 support the administrative findings, or if there is conflicting
26 evidence that will support a finding of either disability or
27 nondisability, the finding of the Commissioner is conclusive.
28 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ALJ'S FINDINGS

The ALJ found Mr. Gonzalez was insured through December 31, 2006, for DIB purposes (Tr. 19). At step one she found plaintiff did not work after onset at SGA levels (Tr. 19). At steps two and three, she found plaintiff suffers from status post open reduction internal fixation and Dwyer osteotomy and screw removal comminuted fracture to the left heel (three surgeries) and a history of alcohol abuse, impairments that are severe but do not meet or medically equal the severity of a Listed impairment (Tr. 21-22). The ALJ found plaintiff is able to perform a range of light work (Tr. 22). At step four, she found he is unable to perform his past work (Tr. 26). At step five, relying on the vocational expert, the ALJ found plaintiff can do other jobs, such as assembly occupations and product inspector and checker (Tr. 27). The ALJ concluded plaintiff was not disabled as defined by the Social Security Act during the relevant period (Tr. 28).

ISSUES

Plaintiff alleges the ALJ erred when she found alcohol abuse a severe impairment, failed to obtain a medical expert's testimony, improperly weighed the medical evidence, and asked the vocational expert an incomplete hypothetical (ECF No. 14 at 7, 9-11). Asserting the ALJ's decision is supported by substantial evidence and free of legal error, the Commissioner asks the Court to affirm (ECF No. 18 at 24).

DISCUSSION**A. Weighing medical evidence**

In social security proceedings, the claimant must prove the existence of a physical or mental impairment by providing medical

1 evidence consisting of signs, symptoms, and laboratory findings;
2 the claimant's own statement of symptoms alone will not suffice.
3 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
4 on the basis of a medically determinable impairment which can be
5 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
6 medical evidence of an underlying impairment has been shown,
7 medical findings are not required to support the alleged severity
8 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
9 1991).

10 A treating physician's opinion is given special weight
11 because of familiarity with the claimant and the claimant's
12 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
13 1989). However, the treating physician's opinion is not
14 "necessarily conclusive as to either a physical condition or the
15 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
16 751 (9th Cir. 1989)(citations omitted). More weight is given to a
17 treating physician than an examining physician. *Lester v. Chater*,
18 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
19 given to the opinions of treating and examining physicians than to
20 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
21 (9th Cir. 2004). If the treating or examining physician's opinions
22 are not contradicted, they can be rejected only with clear and
23 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
24 ALJ may reject an opinion if he states specific, legitimate
25 reasons that are supported by substantial evidence. See *Flaten v.*
26 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
27 1995).

28 In addition to the testimony of a nonexamining medical

1 advisor, the ALJ must have other evidence to support a decision to
2 reject the opinion of a treating physician, such as laboratory
3 test results, contrary reports from examining physicians, and
4 testimony from the claimant that was inconsistent with the
5 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
6 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
7 Cir. 1995).

8 **B. Credibility**

9 To aid in weighing the conflicting medical evidence, the ALJ
10 evaluated plaintiff's credibility and found him less than fully
11 credible (Tr. 23-25). Credibility determinations bear on
12 evaluations of medical evidence when an ALJ is presented with
13 conflicting medical opinions or inconsistency between a claimant's
14 subjective complaints and diagnosed condition. See *Webb v.*
15 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

16 It is the province of the ALJ to make credibility
17 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
18 1995). However, the ALJ's findings must be supported by specific
19 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
20 1990). Once the claimant produces medical evidence of an
21 underlying medical impairment, the ALJ may not discredit testimony
22 as to the severity of an impairment because it is unsupported by
23 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
24 1998). Absent affirmative evidence of malingering, the ALJ's
25 reasons for rejecting the claimant's testimony must be "clear and
26 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
27 "General findings are insufficient: rather the ALJ must identify
28 what testimony not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
2 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

3 Plaintiff does not challenge the ALJ's credibility
4 determination in this appeal. The court discusses it because it is
5 relevant to the ALJ's assessment of the medical evidence. The
6 ALJ's credibility assessment is supported by clear and convincing
7 reasons: plaintiff failed to take medication to relieve allegedly
8 severe pain, engaged in a wide array of daily activities, and his
9 complaints are not supported by objective evidence (Tr. 23-25).

10 (1) *Lack of medication*. Plaintiff did not consistently take
11 either prescribed or over-the-counter pain medication (Tr. 23,
12 citing Ex. 3F, 6F, 10F/2, 12F/16, 23). The ALJ notes plaintiff
13 only began taking pain medication in June 2009, when he asked to
14 have his claim reopened. This was more than eight years after
15 onset (Tr. 23; Tr. 181, 183), suggesting plaintiff's symptoms have
16 not been as disabling as alleged. Treating doctor Bunch's records
17 show significant gaps in visits¹; the ALJ points out they also show
18 plaintiff did not fill the pain medication Dr. Bunch prescribed
19 (Tr. 25). In April 2009 treating doctor Kristi Thompson, D.O.,
20 notes plaintiff failed to go to physical therapy or obtain
21 orthotics (Tr. 385). Failing to follow a prescribed course of
22 treatment without adequate explanation can cast doubt on the
23 sincerity of a claimant's testimony. *Fair v. Bowen*, 885 F.2d 597.
24 603 (9th Cir. 1989).

25 (2) *Daily activities*. The ALJ points out plaintiff's ability
26

27 ¹Dr. Bunch saw plaintiff in June 2003; September 2006; June
28 2008; and June-August and November 2009 (Tr. 192-199; 377-381;
402-405; 407; 410-417; 424-426).

1 to drive a car with a standard transmission shows he can push
2 with his left leg, undercutting claims use of the left foot is
3 severely limited. Other activities include visiting family,
4 cooking, creating crafts, attending church, caring for children,
5 and using a hammer. Plaintiff testified he can lift 50 pounds. He
6 has stated he can sit for an hour. The ALJ observes there is no
7 evidence plaintiff's impairments caused limitations while he was
8 incarcerated during the relevant eight year period (Tr. 24-25; Tr.
9 202-203). The ALJ may consider a claimant's daily activities when
10 weighing credibility. *Thomas v. Barnhart*, 278 F.3d 947, 958-959
11 (9th Cir. 1995).

12 (3) *Objective evidence does not support current complaints.*

13 A lack of medical evidence cannot form the sole basis for
14 discounting pain testimony, but it is a factor the ALJ may can
15 consider when analyzing credibility. See *Burch v. Barnhart*, 400
16 F.3d 676, 681 (9th Cir. 2005). Plaintiff used no orthopedic or
17 assistive devices, and did not appear to be suffering acute
18 distress, in January 2004. Strength testing was normal. In
19 September 2006, Dr. Bunch opined without treatment plaintiff would
20 be limited to light work for six months (Tr. 194-195). Testing in
21 July 2007 and June 2008 revealed no acute pathology. In April 2009
22 James Dahl, M.D., notes plaintiff only complained of some vague
23 numbness over the lateral aspect of the left foot (Tr. 225). The
24 record reflects plaintiff's surgeries (two prior to onset) were
25 generally successful in relieving his symptoms (Tr. 23-24, 193,
26 228, 240, 289, 295, 306, Ex. 6F, 10F, 13F). In September 2004
27 tests results showed the fractures were well healed. Only mild
28 degenerative changes were noted (Tr. 372).

1 To the extent the ALJ relied on plaintiff's appearance when
2 she assessed credibility (she observed him walking at the hearing
3 with no problem)(Tr. 24), the ALJ may have erred. *See Gallant v.*
4 *Heckler*, 753 F.2d 1450, 1455 (9th Cir. 1984)(the fact that a
5 claimant does not exhibit physical manifestations of prolonged
6 pain at the hearing provides little, if any, support for the ALJ's
7 ultimate conclusion that the claimant is not disabled or that his
8 allegations of constant pain are not credible)(internal citation
9 omitted). Given the other evidence in this case, any error is
10 clearly harmless.

11 **C. DAA**

12 Plaintiff contends "in the absence of materiality," alcohol
13 use is not a severe impairment (ECF No. 14 at 11-12). The claim is
14 without merit. An ALJ determines the materiality of substance
15 abuse *only if* a claimant is found disabled. Because the ALJ found
16 Mr. Gonzalez is not disabled, she was not required to consider
17 whether DAA was material to the disability determination. *See*
18 *Bustamante v. Massanari*, 262 F.3d 949, 953-954 (9th Cir. 2001).

19 **D. RFC: light versus sedentary work**

20 Plaintiff contends if the ALJ properly credited the opinions
21 of treating and examining doctors (Dr. Thompson in 2007, 2008,
22 2009; Gary Gaffield, D.O., in 2008, and Dr. Bunch in November
23 2009), she would have appropriately assessed an RFC for sedentary
24 rather than light work (ECF No. 14 at 9-10; Tr. 202-206; 212). The
25 Commissioner responds any error is harmless because the VE
26 testified a person with plaintiff's RFC, which included the option
27 to sit or stand for ten minutes every two hours, could perform
28 *unskilled sedentary and light jobs* such as assembler, production

1 inspector, and checker (ECF No. 18 at 21; Tr. 64, 68-69). The
2 Commissioner is correct.

3 The alleged error is harmless because it is inconsequential
4 to the ultimate nondisability determination, *Stout v. Comm'r. Soc.*
5 *Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006), and because the
6 underlying decision is supported by substantial evidence and other
7 legally valid reasons, despite the alleged error. *See Carmickle v.*
8 *Comm'r. Soc. Sec. Admin.*, 533 F. 3d 1155, 1162-1163 (9th Cir. 2008);
9 *see also Burch*, 400 F.3d at 679. The VE's testimony, which the ALJ
10 relied on, is supported by the record. The evidence supports the
11 ALJ's ultimate determination that plaintiff is capable of
12 performing the three jobs specified by the VE.

13 **E. Medical expert**

14 Next, plaintiff contends the ALJ should have asked a medical
15 expert if plaintiff's impairments are "medically equivalent" or
16 equal to a Listing. He asserts Listings 1.02 and 1.03 "may apply"
17 (ECF No. 14 at 7). The Commissioner answers plaintiff failed to
18 meet his burden of proof at step three; more specifically, the ALJ
19 found plaintiff's impairments did not meet or medically equal
20 Listing 1.02 because Mr. Gonzalez is able to ambulate effectively
21 (at Tr. 22). The Commissioner asserts the ALJ's finding is
22 supported by the evidence (ECF No. 18 at 7, 10-11; Listing 1.02A).

23 The inability to ambulate effectively means a person requires
24 hand-held aids such as two crutches, two canes, or a walker in
25 order to walk. 20 C.F.R. pt. 404, subpt. P, app. 1, section
26 100B2b. The evidence shows plaintiff sometimes uses crutches,
27 including the use of one crutch when he gets up in the morning. He
28 used one cane for a few months after his last foot surgery. In

1 2004 plaintiff said he used no assistive devices. And, as the
2 Commissioner accurately observes, plaintiff's application did not
3 allege he uses any assistive devices (ECF No. 18 at 11; Tr. 44,
4 175, 359).

5 According to Social Security Ruling (SSR) 96-6p, when the ALJ
6 determines that an individual's impairment is not equivalent to
7 any listing, the ALJ may satisfy the duty to receive expert
8 opinion evidence into the record by obtaining the signature of a
9 state medical consultant on the appropriate form (Disability
10 Determination and Transmittal Form, SSA-831). The ALJ correctly
11 concluded, based on the record, plaintiff's impairment did not
12 meet or equal Listing 1.02. The state's non-examining medical
13 experts signed the required SSA-831 forms (see Tr. 74-75, 224).
14 Accordingly, the ALJ satisfied the requirement under SSR 96-6p.
15 The record fully supports the ALJ's step three finding.
16 Plaintiff's impairments do not meet or medically equal Listing
17 1.02.

18 Plaintiff's claim with respect to Listing 1.03 fails for the
19 same reason. This Listing also requires an inability to ambulate
20 effectively, and, as noted, the evidence does not support such a
21 finding. 20 C.F.R. pt. 404, subpt. P, app. 1, section 1.03.

22 The ALJ's step three finding is fully supported by the record
23 and free of error.

24 Plaintiff contends the ALJ was required to call a medical
25 expert to testify. Because plaintiff failed to make this argument
26 to the ALJ, however, he has not preserved it for appeal. Counsel's
27 sole reference at the hearing was the following:

28 "In any case, Your Honor, as I look at that [IME reports],
also the Claimant has developed a hammer toe so those also

1 contribute to the difficulty in ambulation as well as pain.
2 So, in looking at that, Your Honor, looking at the record
3 itself, I thought that 1.02A would probably be the most
4 appropriate. I know we don't have a medical expert here to
5 maybe address that but it looks to be the most appropriate.
6 So that's all I have to say with regard to, you know, a
7 listed impairment."

8 (Tr. 39).

9 Plaintiff failed to argue a medical expert was necessary.
10 Normally the court will not consider an argument for the first
11 time on appeal. See *Massachi v. Astrue*, 486 F.3d 1149, 1154, n.23
12 (9th Cir. 2007). Because the record does not support plaintiff's
13 step three claim, the court's failure to consider the issue will
14 not result in a "manifest injustice." See *Meanel v. Apfel*, 172
15 F.3d 1111, 1115 (9th Cir. 1999)(holding the court will address an
16 issue not raised by the claimant below only if the failure to do
17 so would result in a "manifest injustice").

18 The ALJ's step three finding is free of error and supported
19 by the record, including the consultant's opinion plaintiff's
20 impairments do not meet or equal a Listed impairment. In these
21 circumstances an ALJ is not required to call a medical expert to
22 testify.

23 **F. Weighing the medical evidence**

24 Plaintiff's unexplained lack of treatment and noncompliance
25 with treatment, lack of credibility, lack of supporting objective
26 evidence, and wide range of activities all support the ALJ's
27 assessed RFC. The opinions of Dr. Dahl, Thomas Gritzka, M.D., and
28 some of Drs. Bunch and Thompson's findings also support the
29 assessed RFC.

30 The ALJ rejected Dr. Bunch's RFC for sedentary work because,
among other reasons, Dr. Bunch noted plaintiff was "stabilized for

1 many years" prior to 2009 (Tr. 378, 424). Dr. Bunch also opined
2 plaintiff was limited to light or sedentary work prior to 2009,
3 and thought retraining for other work appropriate. Over several
4 years Dr. Thompson pointed out plaintiff did not take any pain
5 medication, did not go to physical therapy, and did not wear
6 orthotics (Tr. 213, 285, 381, 398).

7 The ALJ is responsible for reviewing the evidence and
8 resolving conflicts or ambiguities in testimony. *Magallanes v.*
9 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
10 trier of fact, not this court, to resolve conflicts in evidence.
11 *Richardson*, 402 U.S. at 400. The court has a limited role in
12 determining whether the ALJ's decision is supported by substantial
13 evidence and may not substitute its own judgment for that of the
14 ALJ, even if it might justifiably have reached a different result
15 upon de novo review. 42 U.S.C. § 405(g). The ALJ did not err when
16 she weighed the somewhat conflicting medical evidence.

17 **G. Incomplete hypothetical**

18 Plaintiff again contends the ALJ should have used a sedentary
19 rather than light RCF in her hypothetical (ECF No. 14 at 10-11).
20 The Court has found any error is harmless. *See D., supra.*
21 Plaintiff contends the ALJ should have relied on the VE's
22 responses to hypotheticals propounded by his counsel, questions
23 that included additional limitations (ECF No. 14 at 11). The
24 Commissioner accurately observes the ALJ is required to include
25 only credible limitations (ECF No. 18 at 20, *citing Magallanes v.*
26 *Bowen*, 881 F.2d 747, 765 (9th Cir.1989). She did so here.

27 ///

28 ///

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this court finds that the ALJ's decision is free of legal error and supported by substantial evidence.

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (**ECF No. 17**) is **granted**.

2. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is **denied**.

The District Court Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of defendant, and **CLOSE** this file.

DATED this 8th day of September, 2011.

s/ James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE